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ABSTRACT

The newsletter issue provides a legal analysis of National Labor Relations Board versus Yeshiva University, a case which limited the right of faculty to bargain collectively under the protections of state statutes. Related cases are noted concerning: (1) Wichita State University in Kansas (which rejected the Yeshiva doctrine); (2) University of Alaska (which held that Yeshiva was not applicable since faculty were legal "employees" and thus allowed to bargain under the Alaska Act); (3) Southern Oregon State College (which refused to exclude department chairs from faculty bargaining units despite their "managerial" status under the Yeshiva standard); and (4) University of Pittsburgh in Pennsylvania (which found faculty to be "management level employees" and thus not entitled to bargain collectively). Analysis of the case law notes that where the Yeshiva argument was disallowed there was a statutory basis for bargaining rights and a distinction made between "supervisory" and "managerial" employees. Proposals for limiting the influence of the Yeshiva case include preventing its extension to the public sector, amending the National Labor Relations Act, and enacting special legislation. A chart presents a summary of higher education public sector collective bargaining legislation by state. Forty-two footnotes document the legal analysis. (DB)

NEWSLETTER
NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUCATION AND THE PROFESSIONS

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Part II: Legal Analysis

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Part II: Legal Analysis

A REVIEW OF THE CASE LAW*

There have been four reported public sector Yeshiva claims thus far. In three, college administrators unsuccessfully argued that Yeshiva was applicable and that faculty were not entitled to bargain collectively under the protections of the state statutes. In the fourth, Yeshiva was applied to limit the right to bargain. Set forth below are summaries and analyses of each decision.

1. **WICHITA STATE UNIVERSITY** - Case No. 75-UD-01-1980 (Kansas PERB 1981)

Pursuant to a unit determination petition filed by the Kansas Higher Education Association, (NEA) and the AAUP Chapter at Wichita State University (WSU), the Kansas PERB was the first state agency to address a Yeshiva claim within the context of the right of college faculty to "meet and confer" under a Public Employer-Employee Relations Act. The university argued that all faculty and department chairs were "supervisors" and had no right to meet and confer under the Kansas Public Employer-Employee Relations Act.

In rejecting Yeshiva and in a strong condemnation of the Yeshiva doctrine, the hearing officer found "...the general acceptance of past recommendations made by the faculty senate or departmental groups of faculty members to be a poor substitute for the supervisory authority ...".[23] The Kansas statute defines a "supervisory" employee as:

> an individual who normally performs different work from his or her subordinates, having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend a preponderance of such actions.[24]

Further "...the definition of a supervisor involves much more individual authority than that of one vote in the senate or a departmental group even though faculty members as professionals hold high regard for the mission and well-being of the university".[25]

The hearing officer noted that the influence of the faculty was based on their substantial professional expertise, rather than their managerial or supervisory functions. Furthermore, any power exercised by the faculty was exercised in concert allegedly, not individually; membership in the University Senate could not be construed as the functional equivalent to managerial authority. The hearing examiner rejected the argument that all faculty were "supervisors", ordered the exclusion of chairpersons from the faculty bargaining unit, and delineated the appropriate unit.

The Kansas PERB upheld the findings of the hearing officer stating: "Frankly, we are not satisfied that the Yeshiva decision is a good decision even on the facts of that case."[26] Moreover, PERB cited several differences between the facts before it and those in Yeshiva. Among these was the fact that Yeshiva is a private university, while Wichita is a public institution with statutory power vested in a board of regents subject to the will of an elected legislature. PERB further stated that it did not accept the arguments raised by the university with respect to faculty governance.

> ...the university in its argument placed stress on the theory of 'shared governance' or

*Editor's Note: Part I of this article appeared in the Journal of Collective Negotiations in the Public Sector-V19(1) "The Impact of NLRB v. Yeshiva University on Faculty Unionism;" J. M. Douglas. Permission to reprint is gratefully acknowledged. This research is published in abbreviated form in two issues of the Newsletter, Vol. 18, Nos. 2 and 3. This issue is devoted to the legal analysis, while the previous Newsletter was devoted to the legislative issues.

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'collegiality'. We do not believe that the situation at Wichita State University places the faculty in a 'governing' position but merely in an advisory capacity as a group. Govern means to exercise authority which suggests the power to enforce. We cannot find this in the record.[27]

PERB ordered that an appropriate bargaining unit, as recommended by the hearing officer, be designated.

2. **UNIVERSITY OF ALASKA** - Case No. UA 80-2 (Alas. Labor Relations Bd. 1981)

In a response to a representation petition by the NEA to organize faculty at the University of Alaska, the University raised Yeshiva as an affirmative defense arguing that faculty should not be allowed to bargain under the Alaska Act. The sole issue placed before the Board was whether the faculty was managerial and if so, whether they should be excluded from coverage of the Alaska Act. The Alaska statute does not specifically mention college faculty as "employees" but does contain a broad definition of "employee" as "...any employee of a public employer",[28] and names the Board of Regents of the University of Alaska as a "public employer".

Relying on legislative intent, the Board found the faculty to be "employees" included within the Public Employees Relations Act (PERA), rather than managers. In not providing the agency with an explicit statutory managerial exclusion, the legislature was presumed to have intended inclusion.

> It appears, therefore, that the Legislature intended the faculty at the University of Alaska to be within PERA. The legislative intent can be discovered from the 1978 amendments... . If the Legislature intended to exempt faculty from bargaining, they could have easily included an express exemption in its definition of employees. The Legislature did not do so, and therefore, this agency takes jurisdiction over the dispute... .[29]

Since the Alaska Public Employee Relations Act (APERA) does not contain a faculty exclusion, the Board refused to create or imply one.

The University also argued that an inherent conflict of interest would exist if the managerial faculty was allowed to bargain, as they already acted as management and controlled the administration of the university. The statute does acknowledge the possibility of the aforementioned "conflict of interest" where certain classifications of "employees" are included with others in the same bargaining unit. In addressing the issue of conflict of interest between "managerial", "supervisory" and rank-and-file "employees" within the same bargaining unit, ALRA held that the concern "...might pertain to formulation implementation of collective bargaining policy, which might lead to the conclusion that collective bargaining units as originally authorized might not be appropriate".[30]

The agency held that Yeshiva was not applicable to the University of Alaska and further stated that if the University's managerial claim was sustained, the faculty would be considered "managerial employees" under PERA and entitled to its own autonomous bargaining unit. The decision focused on legislative intent; the Board found support for coverage under the Act. Absent a managerial exclusion, the Board would not infer that one existed.

3. **SOUTHERN OREGON STATE COLLEGE** - Case No. C-176-82 (Oregon Employment Relations Board, 1985)

In a unit clarification petition filed by Southern Oregon State College (SOSC) seeking to exclude department chairs from a previously designated faculty bargaining unit, the Yeshiva question was once again raised. The college argued that all chairpersons were "supervisory employees" under the definition in the Oregon Public Employment Collective Bargaining Act (PECBA) and, as such, should be excluded from the original bargaining unit certified in 1973 by the Oregon Board. The Employment Relations Board (ERB) had previously held that chairpersons were not "supervisors" and, therefore, not excluded under the Act. In the alternative, and in the event that ERB did not exclude chairpersons as "supervisors", the college maintained that the entire faculty should be excluded as "managerial employees" under the Yeshiva standard.

ERB held that department chairpersons and area coordinators, with one exception, were neither "supervisory" nor "managerial employees". The legislative intent was clear; faculty were entitled to bargain under the protection of the Oregon Act. ERB stated:

> The PECBA contains no definition of "managerial employee". However, the PECBA specifically refers to elections 'involving the faculty of a college or university administered by the State Board of Higher Education...' ORS 243.686(6). It is apparent that the legislature anticipated that this Board would designate appropriate bargaining units composed of college faculty members. Therefore, college faculty members are covered by the PECBA and will not be excluded as "managerial employees".[31]

Based on an oblique reference to faculty bargaining elections in the Oregon statute, ERB concluded that the legislature clearly contemplated faculty bargaining units, and declined to engage in a detailed analysis of the Yeshiva question.

4. **UNIVERSITY OF PITTSBURGH** - Case No. PERA-R-84-53-W

In the first case that excluded public sector faculty under a Yeshiva analysis, a hearing examiner for the Pennsylvania Labor Relations Board (PLRB)

found that faculty at the University of Pittsburgh were "management-level employees" under the Pennsylvania Act and not entitled to bargain collectively under the Pennyslvania statute. This case, if left standing on appeal, represents the first encroachment of Yeshiva on the public sector.

A faculty coalition of the United Faculty of the University of Pittsburgh (an association between the AAUP, the PaAAUP, AFT, and PaFT), filed a petition seeking representation rights for a unit of full-time and regular part-time faculty in the tenure-stream, as well as research associates. The parties stipulated that:

> ...tenured, tenure-stream and full-time, nontenure-stream faculty of the University of Pittsburgh have shared in the governance of the institution in a fashion comparable to those faculties found to be managerial under the principles of NLRB v. Yeshiva University, 444 U.S. 672 (1980), and its progeny. The parties are in further agreement that the only matter to be resolved in this proceeding relating to the status of faculty is the legal issue as to whether under Pennsylvania Law such sharing in the governance of the University confers managerial status upon the faculty of the University of Pittsburgh, thereby excluding their participation in collective bargaining.[32]

By this stipulation, the faculty did not admit that it was managerial; rather, it argued that Yeshiva-type duties did not give rise to managerial status under the Pennsylvania statute. The instant case was limited to one point of law and was considered "non-precedential" by the parties. The Pennsylvania statute excludes "management-level employees" from coverage and confers bargaining rights only to "employees" below first-level "supervisors". The PLRB had previously held that department chairpersons were "first-level supervisors".

The University argued that the faculty in the proposed unit were "supervisory" or "managerial employees" under Yeshiva. Citing "National Labor Relations policy", it argued that the decision in Yeshiva correctly recognized the "unique structure of 'managerial' authority prevailing at universities today", that the managerial exclusion under PERA is broader than the federal exclusion, and must be the basis for the denial of the collective bargaining petition. In sum, the University submitted that the managerial exclusion contained in Yeshiva established a federal precedent and since "Pennsylvania law is consistent with federal law", Yeshiva compelled the same result in the instant proceeding.[33]

The faculty argued that Yeshiva was not controlling, and that they were "professional employees" entitled to bargain. The governance activities in which they were involved "are professional and not management activities". Citing the professional expertise of the faculty in academic matters, the union claimed that no "actual authority" was delegated to them. Further, a vast bureaucracy existed to administer and manage the University.[34]

PLRB had previously established a disjunctive three-part test to determine managerial status in other contexts:

- the employee must have direct involvement in policy determination, or
- the employee must be directly involved in policy implementation, or
- the employee must be above first level of supervision.

An individual must meet only one of the three characteristics to warrant managerial designation. One need not exercise these tasks full-time, nor have ultimate decision-making authority to warrant exclusion.

The hearing examiner rejected the arguments of the faculty and found the proposed unit to be managerial. "Like the faculty in Yeshiva, the faculty of the University of Pittsburgh are vital to the formulation of policy, and the faculty's interests cannot be separated from those of the University."[35]

With respect to the union's claim that its members are professional rather than managerial employees, the hearing examiner noted that the record: "...establishes that the faculty...exercised real managerial authority through participation in university governance".[36] Although individual faculty are powerless to exercise managerial authority alone, and acknowledging that influence is possessed only as a group, the PLRB refused to review each job to determine if the group or classification was "managerial". A unit of nontenure-stream, part-time faculty, full-time and regular part-time librarians was found to be appropriate. Excluded from the unit as "management-level" employees were tenured, tenure-stream and full-time nontenure-stream faculty. Department chairpersons were excluded both as "first-level supervisors" and "managerial employees".

ANALYSIS OF THE CASE LAW

Although these cases present disparate results, this cannot be attributed to a widespread abandonment of Yeshiva. In the cases in which a Yeshiva argument was disallowed, there was some statutory basis, either overt or inferred, for bargaining rights. Where there was no clear "managerial" or "supervisory" exclusion in the statute, or "managers" and "supervisors" had been granted the right to bargain in other contexts, or the statute implied a legislative intent that faculty be allowed to bargain regardless of classification, the Yeshiva argument was denied. On the other hand, if the statute excluded these groups, particularly in Pittsburgh where there was a well-developed managerial exclusion in other contexts, the Yeshiva argument met with success.

(continued on p. 6)

Summary of Higher Education Public Sector Collective Bargaining Legislation[a]

State (N = 27)	Separate Statute	College Defined as Employer	Professor Defined as Employee	Exclusions		Statutory Bargaining Unit	Year Enacted
				Managers / Supervisors			
Alaska	No	Yes	Gen.[b]	Yes[c,d]	No[e]	No	1972
California	Yes	Yes	Yes	Yes[f]	No[e]	Yes[g]	1978[h]
Connecticut	No	Yes	Gen.	Yes[f]	No	Yes	1975
Delaware	No	Gen.	Gen.	Yes[k]	No	No	1970
District of Columbia	No	Yes	Gen.	Yes[f]	Yes[m]	No	1979
Florida	No	Yes	Gen.	Yes[f]	No[n]	No	1974
Hawaii	No	Yes	Gen.	Yes[c]	No	Yes	1970
Illinois	Yes[o]	Yes	Yes	Yes	Yes[p]	No	1983
Iowa	No	Gen.	Gen.	Yes[f]	Yes	No	1974
Kansas	No	Gen.	Gen.	Yes[f]	Yes	No	1974[q]
Maine	Yes	Yes	Yes	Yes[c]	No	Yes	1975[r]
Massachusetts	No	Yes	Gen.	Yes	No	No	1974
Michigan	No	No	Gen.	Yes[s]	No[t]	No	1973
Minnesota	No	Yes	Yes	Yes[f]	No[e]	Yes	1971
Montana	No	Yes	Gen.	Yes[f]	Yes	No	1973
Nebraska	No	Gen.	Gen.	Yes[k]	No[n]	No	1972
New Hampshire	No	Yes	Gen.	Yes[c]	No[e]	No	1975
New Jersey	No	Gen.	Gen.	Yes	No[e]	No	1974
New York	No	Yes	Gen.	Yes[f]	No	No	1967
Ohio	No	Yes	Gen.	Yes[f]	Yes[u]	Yes	1983
Oregon	No	Yes[w]	Gen.	Yes[c]	Yes	No	1975
Pennsylvania	No	Yes	Gen.	Yes[f]	No[e]	No	1970
Rhode Island	No	No	Gen.	Yes[k]	No[x]	No	1958
South Dakota	No	Gen.	Gen.	Yes[c]	Yes[y]	No	1969
Vermont	No	Yes	Yes	Yes[f,z]	No[e]	No	1972
Washington	Yes[w]	Yes	Yes	Yes[k]	No[aa]	No	1987[ab]
Wisconsin	No	Gen.	Gen.	Yes[f]	No[ac]	No[ad]	1966[ab]

Notes

a - Three states—Arizona, Maryland, and Nevada—allow collective bargaining in higher education pursuant to institutional governing board policy. Data with respect to these states are not included.

b - "Public employee" defined as any "employee of a public employer"; it is therefore presumed that college professors meet this generic standard and are statutorily covered.

c - Elected or appointed officials are not included in the definition of "public employee" and are presumed to be excluded from coverage.

d - The Alaska Labor Relations Agency held in University of Alaska (Case No. UA 80-21, ALRB (1981)) that absent a legislated managerial exclusion, it would not infer that one existed.

e - Supervisors are entitled to coverage; however, no unit may combine supervisory with nonsupervisory personnel. (See Alaska Public Employment Relations Act, California Higher Education Employer-Employee Relations Act, Minnesota Public Employee Relations Act, New Hampshire Public Employee Labor Relations Law, New Jersey Employer-Employee Relations Act, Pennsylvania Public Employe Relations Act, and Vermont State Employee Labor Relations Act.

f - Managerial employees are excluded from coverage by statute. "No employee or group of employees shall be deemed to be managerial employees solely because the employee or group of employees participate in decisions with respect to courses, curriculum, personnel, and other matters of educational policy. A department chair or head of a similar academic unit or program who performs the

foregoing duties primarily on behalf of the members of the academic unit or program shall not be deemed a managerial employee solely because of such duties" (see (19, Sec. 3562.(1))).

g - Separate units are prescribed for faculty at each of the nine campuses within the Univ. of California system. A systemwide unit is provided for librarians and another for lecturers. Pursuant to PERB rulings, one systemwide unit is prescribed for faculty of the nineteen-campus California State Univ.

h - Legislation for community college faculty enacted in 1975.

i - "Managerial employees" are specifically excluded from the definition of "public employee". (See Connecticut State Employee Relations Act, Florida Public Employee Relations Act, Minnesota Public Employment Relations Act, New York Public Employees' Fair Employment Act, Ohio Public Employee Bargaining Law, Pennsylvania Public Employe Relations Act, Vermont State Employee Labor Relations Act, and Wisconsin State Employment Labor Relations Act.)

j - "Public employer" is defined as "the state of --, its boards, commissions, agencies, and departments"; it is therefore presumed that colleges and universities meet this generic standard.

k - Statute makes no reference to the status of "managerial employees". Presumption of exclusion controls. Concept of exclusion is so fundamental as to be beyond documentation; unless statute specifically includes "managerial employees," they are deemed excluded. (See Delaware Public Employees' Right to Organize and Bargain Collectively Act, Nebraska Public Employee Bargaining Act, Rhode Island Collective Bargaining by State Employees, and State of Washington Community College Negotiations by Academic Statute Senate Bill.)

l - Although the designation "manager" is not found in the legislation, similar titles, i.e., "administrators," "elected and appointed officials" are excluded.

m - Heads of academic units at the University of the District of Columbia are not deemed to be educational employees. (See D.C. Labor-Management Relations Act, Sec. 301.(F)(6) (1978)).

n - Statute makes no reference to status of supervisors; presumption of inclusion controls. (See Florida Public Employee Relations Act, and Nebraska Public Employee Bargaining Law).

o - Illinois Public Act 1014 covers educational employees at public and secondary schools, faculty at public community college districts, state colleges, and the state university. (See (22)).

p - Although supervisors are excluded, faculty who perform standard NLRA supervisory functions are not excluded from coverage based solely on the exercise of such duties. There is, however, a rebuttable presumption that such faculty shall be deemed supervisory unless proven otherwise. ((22)).

q - Legislation for community college faculty enacted in 1970.

r - Legislation for community college enacted in 1974.

s - Persons holding executive positions are excluded. (See Mich. Public Employment Relations Act).

t - Statute allows unit of supervisors structured along horizontal occupational lines. (See Michigan Public Employment Relations Act).

u - Statute provides that department chairs and faculty members at state colleges are not considered supervisory employees. "With respect to faculty members of a state institution of higher education, heads of departments or divisions are supervisors; however, no other faculty member or group of faculty members is a supervisor solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel, or other matters of academic policy." The remainder of definition is standard NLRA. (See (23, Sec. 4117.01.(F)(3) (1983))).

v - No unit shall contain faculty from more than one institution of higher education. (See (23, Sec. 4117.06(4))).

w - Community colleges only. (See Oregon Collective Bargaining in Public Employment Act, Sec. 243.650(18) (1963)).

x - "Supervisory employees shall not endorse any particular employee organization, or, by reason of membership in any such organization show prejudice or discriminate toward any individual employee." Separate bargaining units are prescribed for supervisors covered by State Employees Bargaining Act. (See Rhode Island Collective Bargaining by State Employees, Sec. 36-11-2 (1958)).

y - The term "public employee" does not include administrators, except elementary and secondary school administrators, administrative officers, directors or chief executive officers of a public employer or major divisions thereof, or any other public employees having authority in the interest of the public employer to hire, transfer, etc. (See South Dakota Public Employees' Union Act, Sec. 3-18-1 (2) (1969)).

z - Excluded from definition of "state employee" are persons "employed as a department or agency head or...head of an institution or as a division director in the department of administration, and similar positions in Vermont state colleges." (See (26, Sec. 902.(5) (D))). Supervisors have the right to form a separate unit of their own or a separate unit as part of the overall state teachers' organization. (See (26, Sec. 937.(a) (1969))).

aa - Legislation defines "academic employee" as any teacher, counselor, librarian, or department head, who is employed by any community college district, whether full- or part-time, with the exception of the chief administrative officer of, and any administrator in, each community college district. An "administrator" is any person employed either full- or part-time by the community college district and who performs administrative functions as at least 50 percent or more of his assignments, and has responsibilities to hire, dismiss or discipline other employees. Administrators shall not be members of the bargaining unit unless a majority of such administrators and a majority of the bargaining unit elect by secret ballot for such inclusion. (See State of Washington Community College Negotiations by Academic Statute Senate Bill no. 5225, Chapter 314, Laws of 1987, Sec. 28B.52.020).

ab - Community college faculty only. (See (21) and Wisconsin State Employment Labor Relations Act).

ac - Although supervisory personnel are not considered "employees" for purposes of this subchapter, the commission may consider petitions for statewide unit of professional supervisory employees..., but the certified representative may not be affiliated with labor organizations representing employees assigned to the statutory units. (See Wisconsin State Employment Labor Relations Act, Sec. 111.814 (D)).

ad - The Wisconsin State Employment Labor Relations Act provides for fifteen statewide units structured along occupational grouping including one for education employees. No legislation exists for state college or university faculty. Community college faculty bargain pursuant to the State Employment Labor Relations Act. However, they have been placed in campus and districtwide units as opposed to systemwide units.

(continued from p. 3)

These decisions do not reject Yeshiva per se but find that the state statutes do not preclude "managers" or "supervisors" from bargaining. If the NLRA provided bargaining rights for "managers" and "supervisors", there would be no Yeshiva in the private sector. If these states' statutes disqualified "managers" and "supervisors", and the faculties were found to be "employees" rather than "managers" and "supervisors", then they would be protected and Yeshiva would be dismissed.

Although the case law contains mixed results, a certain consistency may be noted. First, the "community of interest" standard was raised in Alaska, SOSC, and Wichita State, yet in NLRB v. Yeshiva, this test was not addressed. "Community of interest" tests are normally applied in unit determination and clarification processes and was the basis in SOSC to exclude one department chair. Some of the decisions address whether there was a "community of interest" in the petitioned-for-group, and addressed it as part of the Yeshiva doctrine. The "community of interest" doctrine presumes that the group has the right to bargain and is concerned with whether Employee A should be included in a bargaining unit with Employee B. It is difficult to see the relevance of this test in a Yeshiva context.

Second, the emphasis placed on the definition of "supervisors" is worth noting. The Yeshiva doctrine applies to "managerial employees" and although in certain instances, i.e., Trustees of Boston University v. NLRB, the supervisory issue was addressed, the thrust of Yeshiva is directed toward "managerial employees". Several public sector cases relied on the "supervisory" exclusion rather than the "managerial" which was the focal point of Yeshiva. Although both "managers" and "supervisors" are excluded under NLRA, Yeshiva concerned only the former group. Thus, when a Board claims to be comparing Yeshiva to the case before it, but determines instead the faculty to be "supervisory", it has not applied Yeshiva at all. In those states where "supervisors" have been given the right to bargain, it is submitted Yeshiva claims will be more difficult to win.

Third, in each of these cases, the statutory definitions of "employee" was pivotal. In Wichita, the Board examined "supervisory employees"; in Alaska, "managerial employees"; in SOSC, and in Pittsburgh, levels of supervision. In SOSC, the Oregon Board found that although the statute is silent with respect to defining "managerial employees", it does refer to a unit determination process and elections involving college or university faculty. Since these elections are to be conducted by the Oregon State Board of Higher Education, the presumption was that college faculty would be entitled to bargain collectively. Alaska involves the same type of question, inasmuch as a managerial exemption is not specified. The Alaska Board, exercising its prerogative under the presumption in favor of coverage standard, held that absent an exclusion, inclusion was intended.

Fourth, in many of these cases, the decisions were the products of brief hearings, or of general stipulations as to the duties of the faculty. Because of this, the facts were presented only superficially, and in a conclusory manner. By contrast, representation case hearings in some NLRB post-Yeshiva cases have taken years.[37] Further, some of the state Boards appeared to be using incorrect standards in their analysis. In Alaska and Pittsburgh, the faculty unions stipulated that the faculty, at times, act as management thereby alleviating the need of the employer to build a voluminous record. These stipulations, while a matter of administrative convenience, may have contributed to fact patterns that were general, and, in some cases, conclusory.

LIMITING YESHIVA: A PROSPECTIVE APPROACH

Faculty unionists are redirecting their efforts to limiting the influence of Yeshiva. Initially, they searched for a lead case[38] that would reverse the decision. Failing in that approach, they argued in successor cases[39] that Yeshiva could be distinguished from the instant claim and that no other institution fit the Yeshiva fact pattern. This too proved unsuccessful as faculty unions lost most significant Yeshiva encounters. During this time period, public sector Yeshiva challenges began to emerge.

Since approximately 95% of organized faculty teach in public institutions, there is growing concern about future Yeshiva applications. Set forth below are three options that academic unions in particular and organized labor in general, might pursue in order to limit the spread of Yeshiva.

A. CONTAINMENT APPROACH

Assuming arguendo that for all practical purposes the Yeshiva question has been lost at private colleges, the issue becomes one of containing

Yeshiva to that sector. Since the overwhelming majority of unionized faculty are employed at public institutions, why then should faculty unions continue to pursue what appears to be a losing battle in this area?

The greater challenge to academic collective bargaining rests in the extension of Yeshiva to the public sector. Relying on a containment approach, one which would oppose the extension of Yeshiva in the public sector on a state-by-state basis, faculty unions might be successful in limiting its growth. This might be feasible since public sector bargaining rights extend higher in the chain of command and frequently include supervisors. By adopting a greater good for the greater number philosophy, Yeshiva damage may be controlled. This approach would be more advantageous to the NEA, which represents largely public sector faculty, and of less interest to the AAUP or the AFT.

B. AMEND THE NLRA

A second approach focuses on amending the NLRA to provide for faculty inclusion, thus legislatively eliminating Yeshiva. This approach has been attempted by the introduction of bills in the United States House of Representatives, and thus far has been unsuccessful. The AAUP has proposed legislation to amend the NLRA and exempt faculty from managerial and supervisory status. Their bill states:

> ...that no faculty member or group of faculty members in any educational institution shall be deemed to be managerial or supervisory employees solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel, budget[40] or other matters of educational policy.

Another potential change in the Act concerns enlarging the definition of "employee" under Sec. 2(3). This proposal, advocated by some faculty unionists, would redefine and recognize the concept of the "collective exercise of expert judgment" to preclude a finding of managerial status based on a faculty member's exercise of expert professional judgment.

C. SPECIAL LEGISLATION

A third approach to the Yeshiva question would be the enactment of a separate national collective bargaining bill for private college faculty and other "professional employees". The NLRA recognizes the right of "professional employees" to bargain, however, a separate bill would necessitate a reassessment of faculty collective bargaining rights. The current interpretation of Yeshiva pushes academic "professional employees" into management. In order to achieve separate legislation, faculty unions might be forced to give up certain rights which might be construed under the new legislation as inconsistent with professionalism.[41] Special legislation could potentially create a new model of private sector labor relations which redefines cooperation and authority for professionals within a unionized employment relationship.[42] Other legislative approaches might be to seek amendments in existing state public bargaining statutes to prevent Yeshiva claims.

CONCLUSION

Unions have been unsuccessful in limiting the proliferation of Yeshiva claims in private sector colleges and universities; now a growing concern is its public sector application. Faculty unions are beginning to broaden their coalitions and seek the assistance of other unions in order to bring the Yeshiva question before a larger body. In an attempt to do this, they are seeking input and leadership from the AFL-CIO; however, it is uncertain whether the goals of the larger body can accommodate or can be compatible with those of academic unionists. This question extends beyond academic bargaining as the American labor force undergoes significant change from a manufacturing environment to a high technology service economy. The extension of the Yeshiva doctrine could be construed as forbidding participative management and increased labor-management cooperation.

Assuming the continued vitality of Yeshiva in the private sector, there appears to be no legal or structural impediment to its application in the public sector in those states that follow the same statutory framework as the NLRA. The cases discussed do not reject Yeshiva, but find some statutory reason why it does not apply to faculty within that particular state. Insofar as some state statutes expressly or impliedly protect faculty collective bargaining rights, Yeshiva may never have the same effect on the public sector as it has in the private sector. However, in states without protection for faculty, the extension of the Yeshiva doctrine represents a serious challenge to organized labor and faculty unionism.

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FOOTNOTES

Note: For footnotes 1-22, see Newsletter, Vol. 18, No. 2, Apr./May 1990.

23. In the Matter of Witchita State University, Case No. 75-UD-01-1980 (Kansas PERB 1981) Unit Determination Order at p. 11.

24. Kansas Statutes Annotated Sec. 75-4322(b).
25. Ibid. See Note 23.
26. In the matter of Witchita State University, Case No. 75-UD-01-1980 (Kansas PERB 1981), Findings of Fact, Conclusions and Order, at p. 4.

27. Ibid.
28. Alaska Statutes, Title 23, Chapter 40, Sec. 23.40.070 et. seq. (1972).
29. See Note 18.
30. See Note 18 at p. 9.

31. In the Matter of Southern Oregon State College, Case No. C-176-82 (Oregon Employment Relations Board, 1985) at p. 16.

32. In the Matter of the University of Pittsburgh, Case No. PERA-R-84-53-W (1987), at pp. 3-4.

33. Brief on Behalf of the University of Pittsburgh, PERA-R-84-53-W, at pp. 4, 50.

34. See Note 32, Stipulations No. 3 (a-g). See also Brief of the United Faculty of the University of Pittsburgh AAUP, AFT, AFL-CIO, PERA-R-84-53-W, at p. 7.

35. See Note 32 at p. 25.

36. Ibid, p. 30.

37. In Boston University, litigation over the managerial and supervisory issue began in 1975 and ended in 1987. Hearings on the Yeshiva question took over two-and-a-half years of testimony and 1,180 supporting documents and exhibits. In Polytechnic Institute of New York, NLRB 29-UC-136 (1982), hearings lasted for 100 days with 20,000 pages of testimony and more than 1,100 documents and exhibits.

38. Subsequent to Yeshiva, faculty unionists suggested that either Salem College, University of Albuquerque, Boston University or Curry College might become the lead case. In Salem College, NLRB-UC- (1981), a faculty petition for an NLRB representation election was challenged by the college administration based on a Yeshiva-like claim. In Albuquerque, NLRB 28-UC-106 (1980), the faculty union was decertified. In Curry College, 1-CA-17, 225 (1980), the AAUP voluntarily relinquished their status as a Board certified union in exchange for the institution withdrawing all Yeshiva litigation.

39. In successor cases, faculty unionists argued that certain managerial and/or supervisory functions enjoyed by faculty and exercised in the governance of the institution were obtained through the collective bargaining process and to apply Yeshiva would create a situation whereby faculty unions could negotiate themselves out of existence. This argument was set forth in Wagner College, NLRB 29-UC-147 (1982), and rejected.

40. Bill No. H.R. 1865, 100th Congress, 1st Session, March 31, 1987. The proposed bill would amend Section 2(11) of the NLRA by inserting new language at the end.

41. These rights might include exclusive union representation and allow nonunion members to communicate directly with the employer. See Minnesota Statate Board for Community Colleges v. Knight, 104 S. Ct. 1048 (1984).

42. The Labor Management Cooperation Act of 1978 encourages and supports "joint labor-management activities" and is designed, in part, to "study and explore new and innovative joint approaches to achieving organizational effectiveness." It has been suggested by representatives of the AFL-CIO Public Employee Department that this Act, or similar legislation, serves as the basis for reexamining the Yeshiva decision. See Labor Management Cooperation Act of 1978, (P.L. 95-524, October 27, 1978; Incorporated into Text of U.S.C. 173, 175a and 186).

END

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